

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHAWN KEVIN BALLARD,

Defendant-Appellant.

UNPUBLISHED

August 21, 2003

No. 225560

Macomb Circuit Court

LC No. 98-001651-FC

ON REMAND

Before: Jansen, P.J., and Hoekstra and Gage, JJ.

PER CURIAM.

This case is before us for the second time on remand from our Supreme Court. *People v Ballard*, 468 Mich 918; 664 NW2d 211 (2003) (*Ballard II*). Following a jury trial, defendant was convicted of armed robbery, MCL 750.529, and sentenced to 2-1/2 to 20 years' imprisonment. In our earlier opinion, in a split decision, we reversed defendant's conviction and remanded for a new trial finding that the failure of defendant's trial counsel to object to an expert's inadmissible testimony constituted ineffective assistance of counsel. *People v Ballard*, unpublished opinion per curiam of the Court of Appeals, issued February 28, 2003 (Docket No. 225560) (*Ballard I*), reversed 468 Mich 918; 664 NW2d 211 (2003). Our dissenting colleague disagreed that defense counsel's failure to object to the expert's testimony amounted to ineffective assistance of counsel. *Ballard I*, *supra* at slip op p 3 (Gage, J., dissenting). The dissent expressed that defendant had not met his high burden of overcoming the presumption that he received effective assistance of counsel. *Id.* at slip op p 3.

In lieu of granting leave to appeal, the Supreme Court reversed our earlier decision for the reasons stated by the dissenting judge and remanded the matter to this Court for consideration of defendant's remaining issue on appeal.¹ *Ballard II*, *supra*. In light of the reversal and remand, we affirm.

Pursuant to the remand order from our Supreme Court we address defendant's remaining issue on appeal. Defendant claims that he was denied the effective assistance of counsel because his trial counsel failed to obtain an "independent examination" of the latent print. We disagree.

¹ We note that defendant's remaining issue on appeal is also an ineffective assistance of counsel issue.

When reviewing a claim of ineffective assistance of counsel, this Court's review is limited to the facts contained on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002); *People v Hedelsky*, 162 Mich App 382, 387; 412 NW2d 746 (1987). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *LeBlanc*, *supra*, at 579. The court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. *Id.* The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.*

Generally, to establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different; and (3) that the resultant proceedings were fundamentally unfair or unreliable. *Bell v Cone*, 535 US 685; 122 S Ct 1843, 1850; 152 L Ed 2d 914, 927 (2002); *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Deference is afforded to counsel's strategic judgments, but strategic choices made after an incomplete investigation are reasonable only to the extent that reasonable professional judgments support the limitation on investigation. *Wiggins v Smith*, ___ US ___; 123 S Ct 2527, 2535-2537; 156 L Ed 2d 471 (2003). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Decisions as to what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997); *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999), and the failure to call witnesses or present other evidence can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense, *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds, 453 Mich 902 (1996); see also *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). A substantial defense is one which might have made a difference in the outcome of the trial. *Hyland*, *supra* at 710; *Daniel*, *supra* at 58. This Court will not second-guess decisions based on trial strategy. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). That a strategy does not work does not render its use ineffective assistance of counsel. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001).

The exact nature of defendant's argument is not clear. On one hand, defendant seems to argue that trial counsel erred in failing to object to the prosecution's reliance on evidence that was not disclosed during discovery. The record is not sufficient for adequate review of the first argument. See *Rodriguez*, *supra* at 38. Although trial counsel testified at the *Ginther*² hearing that his discovery materials indicated only that Christine Dyke could neither confirm nor deny that the fingerprint was defendant's, the record does not reveal what discovery materials defense counsel received, or when he received them or what discovery requests he made. Defendant also

² *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

seems to argue that trial counsel should have engaged Edward Davis as an expert witness at the trial to testify that Dyke erroneously examined the print.

The second part of defendant's argument presents a closer question. Dyke's "ninety-nine percent" certainty was damaging to defendant, and Davis' *Ginther* hearing testimony could have undermined Dyke's testimony at trial. Davis challenged Dyke's finding of six points of comparison, and opined that the fingerprint was too smeared to use for identification. In hindsight, calling Davis could have been a good strategy. However, trial counsel's failure to call Davis does not constitute ineffective assistance. The decision to call witnesses, including expert witnesses, is a matter of trial strategy best left to trial counsel. *People v Davis*, 250 Mich App 357, 367; 649 NW2d 94 (2002); *People v Viane*, 119 Mich App 690, 693; 326 NW2d 607 (1982). Trial counsel opted for the strategy of eliciting Dyke's concession that identifications based on fewer points of comparison are less reliable, and that there was nothing unusual about the print. As noted by our dissenting colleague in *Ballard I*, *supra*:

Trial counsel did not walk away from the witness' assertion. He effectively cross-examined the witness and cast doubt on her conclusions by pointing out that she did not meet her own standard. He elicited testimony from the witness that the pattern on the print was "normal," and that other persons have similar prints. He also highlighted the fact that the witness could not state with absolute certainty that the print matched defendant. . . . He elicited the acknowledgement that other examiners use a higher point standard and that Ms. Dyke could not say with certainty that this was a positive match. He also elicited testimony that experts differ all the time and that opinion testimony is only that expert's opinion. [*Ballard I*, *supra* at slip op p 3 (Gage, J., dissenting).]

The trial court even aided defense counsel's strategy by sua sponte correcting the prosecutor when she used the term "match." Because trial counsel employed a reasonable strategy to respond to Dyke's evidence, defendant cannot establish that counsel's failure to call Davis instead constituted an unreasonable error. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). We cannot second-guess decisions based on trial strategy. *Davis*, *supra* at 368.

The failure to call witnesses or present other evidence can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *Hyland*, *supra* at 710; *Daniel*, *supra* at 58. However, a substantial defense is one which might have made a difference in the outcome of the trial. *Id.* Our dissenting colleague's analysis with regard to whether defense counsel's failure to object made a difference in the outcome is equally applicable for this issue of whether a failure to obtain an independent examination made a difference in the outcome:

A major component of an ineffective assistance of counsel claim is that defendant must demonstrate a reasonable probability "that, but for counsel's error, the result of the proceedings would have been different, and the attendant proceedings were fundamentally unfair or unreliable." *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). The evidence against defendant was strong in this case. The victim identified defendant out of a photographic lineup. During defendant's interrogation, when Detective Pierog told him that a witness had identified him as the robber, defendant replied, "how could they identify me, I

had a mask on." Although defendant attempted to down play this statement by claiming that other detectives had told him that the robber wore a mask, the detective present at the time of defendant's arrest denied telling defendant that the robber wore a mask. Further when Detective Pierog informed defendant that the fingerprint technician could neither confirm nor deny that a latent fingerprint on the car was his, defendant replied, "Hey, look, I wasn't the driver. If you've got the prints there it's not mine." Detective Pierog then informed defendant that the fingerprint had been taken from the passenger's side mirror. Both statements made by defendant placed him squarely at the scene and could indirectly amount to an outright admission of his involvement in the offense.

Although Ms. Dyke's testimony was incriminating to defendant, it was sufficiently challenged by trial counsel and the court. . . . In light of the other evidence of defendant's guilt, any mistake on the part of trial counsel was unlikely to have influenced the verdict, or to have called into question the fairness or reliability of defendant's trial. [*Ballard I, supra* at slip op p 3 (Gage, J., dissenting).]

For the reasons stated above, upon a de novo review of this constitutional issue, defendant has not established the deficient performance and prejudice required to succeed on a claim of ineffective assistance of counsel. *Leblanc, supra* at 579.

Affirmed.

/s/ Kathleen Jansen
/s/ Joel P. Hoekstra
/s/ Hilda R. Gage